

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

American Teleservices Association, Inc.

Petition for Declaratory Ruling with Respect to
Certain Provisions of the New Jersey Consumer
Fraud Act and the New Jersey Administrative Code

CG Docket No. 02-278

In the Matter of

ccAdvertising

Petition for Expedited Declaratory Ruling

CG Docket No. 02-278

**COMMENTS OF THE AMERICAN FINANCIAL SERVICES ASSOCIATION
IN SUPPORT OF PETITIONS FOR DECLARATORY RULINGS FILED BY THE
AMERICAN TELESERVICES ASSOCIATION AND CC ADVERTISING**

The American Financial Services Association (“AFSA”) appreciates this opportunity to comment on the Proposed Rule issued by the Federal Communications Commission (the “Commission”). AFSA submits these comments in support of the Petition for Declaratory Ruling filed on August 24, 2004 by the American Teleservices Association (“ATA Petition”). The ATA Petition asks the Commission to rule that certain provisions of the New Jersey

Consumer Fraud Act (“NJ Act”) and New Jersey Administrative Code (“NJ Rules”) may not be applied to interstate telemarketing.

AFSA is the national trade association for consumer credit providers. The credit products offered by AFSA’s members include personal loans, first and second mortgage loans, home equity lines of credit, credit card accounts, retail sales financing and credit insurance.

AFSA files these comments because many of its members are significant users of interstate telephone service to market their products and services, and for other purposes relevant to their businesses.

1. Preemption of inconsistently restrictive state laws is essential to efficient conduct of business by interstate telephone.

AFSA strongly endorses the finding that the Commission has already made in this proceeding:

“We conclude that inconsistent interstate rules frustrate the federal objective of creating uniformed national rules, to avoid burdensome compliance costs for telemarketers and potential consumer confusion. . . . [A]pplication of inconsistent rules for those that telemarket on a nationwide or multi-state basis creates a substantial compliance burden for those entities.”¹

The Federal rules restricting telemarketing have already dramatically reduced the volume of telemarketing calls and have adequately addressed concerns about their intrusive effect, striking the right balance in recognition of the value of the interstate telephone channel as an efficient means of delivering goods, services, and messages. AFSA members who conduct telemarketing activities are equipped to comply with those Federal rules, now and in the future.

State laws, such as those of New Jersey and North Dakota, that significantly deviate from the Federal regime impair interstate commerce in telephone traffic, which should be the

¹ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 18 F.C.C. Rcd 14014 ¶83 (2003).

exclusive domain of this Commission. Divergent rules in multiple states increase the expense and operational burdens on nationwide telemarketing activities, resulting in less service to all states, and higher risks of operational errors leading to inadvertent non-compliance.

The New Jersey and North Dakota laws provide a number of examples of the substantial burdens and inefficiencies that these state laws can cause, both in themselves and by reason of their inconsistency with Federal laws and the laws of other states.

- New Jersey's much more restrictive concept of an established business relationship will mean that in many cases consumers will be unable to receive follow-up calls that they may expect and desire.
- New Jersey's refusal to extend the concept of an established business relationship across different affiliates within a single corporate group will impair the business of corporate groups that have been organized for reasons quite irrelevant to interstate telephone marketing. For example, financial services companies, such as AFSA's members, structure their corporate organizations largely as a result of financial institution regulations and the activity rules of their chartering authorities.
- New Jersey's application of its Do Not Call list to telemarketing service providers as distinct entities from the sellers for whom they work, such as AFSA's members, is likely to diminish the availability of telemarketing service providers and force sellers to move more toward conducting their telemarketing campaigns in-house. Such a move would be inefficient, as many sellers are generally less equipped to conduct multi-state telemarketing campaigns, and currently rely on telemarketing service providers to develop the necessary expertise and infrastructure, including with respect to regulatory compliance.
- Different disclosures, and different placement of disclosures, required by the New Jersey law will require different calling scripts and modifications of automated screen-prompt systems for use in New Jersey alone.
- North Dakota's restrictions on telephone delivery of recorded messages, going beyond the already highly restrictive Federal regime, will preclude even those messages in which no product or service is marketed for sale, for example the conduct of consumer

surveys, which can be important to companies in collecting data necessary to assess their business strategies.

2. Preempting burdensome state laws is well within the authority of the Commission.

The Telephone Consumer Protection Act is structured on the assumption that interstate telephone commerce would be subject to the uniform national rules that the Act created and authorized the Commission to adopt, and not to a patchwork of state laws. The Act's provision that addresses the relationship between the Act and state law authorizes states to impose "more restrictive *intrastate* requirements" (47 USC, §227(e)), a provision that would be unnecessary if states were not already preempted, by the Communications Act of which the TCPA is a part, from regulating *interstate* telephone service. The legislative history of the TCPA confirms this understanding, and includes such statements as "states do not have jurisdiction over interstate calls."² In the Congressional Record, Senator Hollins stated: "Pursuant to the general preemptive effect to the Communications Act of 1934, State regulation of interstate communications, including interstate communications initiated for telemarketing purposes, is preempted."³ That conclusion has been affirmed by the Federal courts.⁴

For the foregoing reasons, AFSA asks that the Commission grant the petitions for declaratory rulings. AFSA appreciates the opportunity to comment on the Proposal and again thank the Commission for their efforts. Should you have any questions about this letter, please do not hesitate to contact the undersigned at (202) 466-8606.

² S. Rep. No. 102-178, p. 3, S. Rep. No. 177, page 3.

³ 137 Cong. Rec. S18781, p. 10.

⁴ *Nicholson v. Hooters of Augusta*, 136 F.3d 1287, 1288 (11th Cir. 1998); *International Science Technology Institute Inc., v. Inacom Communications, Inc.*, 106 F.3d 1146, 1154 (4th Cir. 1997); *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 105, 113 (5th Cir. 1997); *Moser v. FCC*, 46 F.3d 970, 972 (9th Cir. 1995).

Respectfully submitted,

A handwritten signature in black ink, reading "Robert E. McKew". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Robert McKew
Senior Vice President and General Counsel
American Financial Services Association